

Steven F. Alder (#00033)
Emily Lewis (#
MARK L. SHURTLEFF
UTAH ATTORNEY GENERAL'S OFFICE
1594 W. North Temple #300
Salt Lake City, UT 84116
Attorneys for Utah Division of Oil, Gas & Mining

FILED

FEB 17 2011

**SECRETARY, BOARD OF
OIL, GAS & MINING**

**BEFORE THE BOARD OF OIL, GAS, AND MINING
DEPARTMENT OF NATURAL RESOURCES
STATE OF UTAH**

LIVING RIVERS, a non-profit
association,

DIVISION'S MOTION *IN LIMINE*

Petitioner,

AND

v.

MOTION TO STRIKE PRE-FILED
TESTIMONY

DIVISION OF OIL, GAS AND
MINING,

Respondent,

Docket No. 2010-027

EARTH ENERGY RESOURCES, INC.

Cause No. M/047/0090

Intervenor/Respondent

The Utah Division of Oil, Gas and Mining, (Division), submits this Motion *in Limine* and Motion to Strike asking that the Board: (1) preclude admitting as evidence any testimony and exhibits offered by Petitioners to undermine or challenge the correctness of decisions by the Utah Division of Water Quality (DWQ) regarding the PR Springs Mine; and (2) strike all portions of the pre-filed expert testimony and exhibits (as detailed on by Respondent Earth Energy Resources' Motion to Strike) that are offered and intended for the purpose of attacking the DWQ determinations.

The correctness of the DWQ decisions are not a proper subject of this hearing and evidence and expert opinions to that effect are not within the purview, jurisdiction, and

expertise of this Board. Such testimony and exhibits are irrelevant to the issues properly under appeal; will unnecessarily extend the time required for the hearing; and will add false issues and technical testimony that will tend to confuse examination of the real issues. The proper forum for such testimony is an appeal of the DWQ decisions. The DEQ Board or hearing officer is the appropriate entity to weigh the testimony of the Petitioner's experts against the technical response of DWQ personnel. The DWQ employees are the persons truly knowledgeable regarding the scientific and legal issues related to the DWQ permits and the proper parties to respond to such allegations.

The issue before the Board is whether the EER's NOI contains adequate information regarding the potential effects of mining on surface and ground water systems; i.e., whether the Division made correct determination regarding the adequacy of the information provided. The Division in making that determination admittedly relied on the expertise and determinations by DWQ in issuing permits. The issue regarding the DWQ permits is whether the Division's reliance on DWQ's permit decisions was appropriate which is a legal determination. The Division argues that its reliance on DWQ's permit was legally sufficient, and was technically reasonable. The Division was not required to re-examine the ground water permit decision and it would be incorrect for the Board to do so.

ARGUMENT

1. The Division reasonably and appropriately relied on the expertise and permitting decisions of DWQ.

As part of its evaluation of Earth Energy Resources' Notice of Intention, the Division is required to evaluate the impacts of the proposed mining operations on surface

and ground water systems. (Utah Admin. Code §R647-4-109 (2010)). In making this evaluation, the Division relied in part on the permitting decisions by DWQ providing for a ground water permit by rule. This reliance was reasonable and appropriate due to the expertise of the DWQ staff in evaluating and regulating the effects of mining operations on surface and ground waters. In addition, the Utah Land Mine Reclamation Act (Utah Code §§ 40-8-1 to 24(2010)) anticipates and permits the Division to rely on actions by the Utah Department of Environmental Quality. (Utah Code §§ 40-8-5(2) and (3) (2010)) The Division's reliance on DWQ's ground water permit is appropriate and based on the overlapping purposes of the laws administered by DWQ and the Division to protect surface and ground water systems. The Division is required to coordinate and cooperate with other state agencies. (Utah code §40-8-5(2)) In addition, an operator is required to comply with other state and federal laws and specifically the requirements of the Utah Department of Environmental Quality (Utah Code § 40-8-5(2) and (3)).

2. The permitting decisions of DWQ are not subject to review or reconsideration by this Board.

Notwithstanding this reasonable reliance by the Division on the DWQ permitting decisions, these decisions are not subject to review by the Board of Oil, Gas and Mining. The determinations by DWQ are governed by the Utah Water Quality Act (Utah Code §§ 19-5-101 to 124 (2010) and regulations at Utah Admin. Code §§ R317-8-3.9 (Storm Water Permits), and R317-6-6.2 (Groundwater Permit-by-rule). The decisions by DWQ are subject to appeal pursuant to Utah code § 19-5-112(2010).

The Petitioners have by pre-filed testimony, depositions, and proposed exhibits that indicate that they intend to challenge the Division's NOI approval by attempting to

show that the decisions by DWQ were in error or based on inadequate or incorrect facts. That is not an issue for the Board to decide. The only issue before the Board with regard to the DWQ permitting decisions is whether the Division reasonably relied on them. This is a legal determination that may reasonably include questions about consistency of the information submitted to DWQ with the information in the NOI, but the technical correctness of DWQ's decisions is not an issue the Board can or should consider. If the information submitted to the DWQ is consistent with the information in the NOI, then the decision of DWQ that is based on those facts is exclusively within the authority of the DWQ and its appellate process.

3. Evidence should be limited to testimony and exhibits relevant to the requirements of the DOGM regulations and not delve into subjects beyond the scope of the regulations.

The burden of proof is on the Petitioners to prove its allegations that the Division failed to meet the requirements for approval of a large mine NOI. These regulations require EER to describe the impacts to surface and groundwater systems and the actions it will take to mitigate those impacts. (R647-4-109)

The regulations do not require proof that there will be no adverse impact from chemicals or mining processes; but that the Division correctly determined that the NOI adequately *describe* the potential impacts and actions to mitigate those impacts. The hearing should be limited to this question, not deal with questions about other inquiries the Division *could have made* to investigate the impact to from the mining. There is always more that can be asked. The question is: did the NOI satisfy the regulations; not, have all possible uncertainties regarding possible impacts eliminated.

The issue of the Division's reliance on DWQ is relevant to that question, but the Division's actions are those in question, not DWQ's investigations. The Division admits that it is without expertise in areas of toxicity or chemistry regarding the chemicals used in the processing of the ore. The information submitted by the EER in its application for a groundwater permit by rule addresses this question and is included in the NOI. This information (and more as requested) was submitted to DWQ and found to have a *de minimis* adverse effect on the groundwater systems.

Testimony consisting of technical questions about a lack of certainty of this decision go beyond the proper issues before the Board. Those issues are limited to the adequacy of the NOI to satisfy the regulations. Other testimony should be excluded. The Division is not required to investigate all possibilities of impacts, but may rely on the investigations by others and is expressly authorized to rely on the DWQ permit decisions. Furthermore, the hearing should not engage in examinations outside of the charge of the Mine Land Reclamation Act and the expertise of the Division in an attempt to analyze all possible impacts from this operation. The Division is charged with authorizing mining in a manner that is reasonable and allows for reclamation of the mined lands, not preventing all impacts from mining.

CONCLUSION

The NOI requirements do not constitute the only regulatory oversight for this mining operation. The DWQ permits are required and will require oversight. The operations under the NOI will involve inspections and other oversight by the Division to assure compliance with the other regulations including the required Operational Practices and Reclamation Practices. Compliance with the NOI and the regulations will be subject

to the continued inspection and the professional judgment of the Division and other agencies.

The Board should preclude testimony that addresses the correctness of the DWQ permit decisions or goes beyond the issue of the adequacy of the NOI to satisfy the regulations.

Respectfully submitted this 17th day of February, 2011.

A handwritten signature in black ink, appearing to read "Steve Alder", written over a horizontal line.

Steve Alder,
Assistant Utah Attorney General
Counsel for Division of Oil, Gas and Mining

Certificate of Delivery

The undersigned affirms that he did mail or email a true and correct copy of the forgoing Division's Motion *in Limine* and to Strike, to the following persons and addresses on this 17 day of February, 2011.

Rob Dubuc
Joro Walker
Western Resource Advocates
Attorneys for Petitioners
150 South 600 East Suite 2A
Salt Lake City, UT 84102

A. John Davis
M. Benjamine Machlis
Holme Roberts & Owen LLP
Attorneys for Respondent
299 South Main St. #1800
Salt Lake City, UT 84111

Mike Johnson
Assistant Utah Attorney General
Counsel for Board of Oil Gas and Mining
1594 West North Temple St. #300
Salt Lake City, UT 84118


